90-1107

(1)

Supreme Court, U.S.
FILED
JAN 2 1991
JOSEPH F. SPANIOL, JR.
CLERK

No. ____-____

IN THE

Supreme Court of the United States

October Term, 1990

MICHAEL R. McGUIRE,

Petitioner,

v.

THE STATE OF WASHINGTON;
RONALD O. BAILEY
AND JANE DOE BAILEY, HIS WIFE,
AND THE MARITAL COMMUNITY COMPOSED THEREOF,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE WASHINGTON STATE COURT OF APPEALS DIVISION II

James M. Beecher
Counsel of Record
Gary A. Boe
HACKETT, BEECHER & HART
2200 Westlake Center
1601 Fifth Avenue
Seattle, Washington 98101-1625
(206) 624-2200

December 28, 1990

Counsel for Petitioner

ABCD Legal Printers, Seattle, WA

25

QUESTIONS PRESENTED FOR REVIEW

1. Can a long-time state employee have a constitutional property right in his employment if his job is exempt from civil service?

2. By excluding a particular job classification from civil service, is a state relieved of any due process requirement for a pre-termination hearing of a long-time state employee?

3. On summary judgment, can a state be relieved of written and oral assurances of continued employment absent "good cause" by excluding a particular job category from civil service regulations?

4. At summary judgment, is evidence that a law enforcement officer is no longer employable in the law enforcement field because of the stigma created by wrongful termination a sufficient showing of loss of liberty under the Fourteenth Amendment?

LIST OF PARTIES

The plaintiff/appellant to the proceeding in the State of Washington Court of Appeals, Division II was:

a) Michael R. McGuire.

The defendants/appellees to the proceedings were:

a) The State of Washington;

b) Ronald O. Bailey and Jane Doe Bailey, his wife, and the marital community composed thereof.

TABLE OF CONTENTS

Page

Questions Presented for Review i

List of Parties ii

Opinions Below 1

Jurisdiction 2

Constitutional Provisions Involved 2

Statement of the Case 2

Reasons for Granting the Writ 4

Conclusion 5

Appendices:

Appendix A. Opinion of The Wasington State Court of Appeals, Division II A-1

Appendix B. Order Of The Washington State Supreme Court B-1

Appendix C. Affidavit of Michael R. McGuire In Opposition To Defendants' Summary Judgment Motion And In Support Of Cross-Motion For Partial Summary Judgment C-1

TABLE OF AUTHORITIES

Cases *Page*

Board of Regents v. Roth, 408 U.S. 564, 33 L.Ed.2d 548, 92 S.Ct. 2701 (1972) 5

Jordan v. Oakville, 106 Wn.2d 122, 720 P.2d 824 (1986) 4

Statutes

28 U.S.C. §1257(a) 2

Other Authorities

U.S. Constitution, 14th Amendment, Sec. 1 2

IN THE

Supreme Court of the United States

October Term, 1990

MICHAEL R. McGUIRE,

Petitioner,

v.

THE STATE OF WASHINGTON;
RONALD O. BAILEY
AND JANE DOE BAILEY, HIS WIFE,
AND THE MARITAL COMMUNITY COMPOSED THEREOF,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE WASHINGTON STATE COURT OF APPEALS DIVISION II

The petitioner Michael R. McGuire respectfully prays that a writ of certiorari issue to review the judgment and opinion of the State of Washington Court of Appeals, Division II, entered in the above-entitled proceeding on June 6, 1990.

OPINIONS BELOW

The opinion of the State of Washington Court of Appeals, Division II, was published. It is reprinted in Appendix A.

JURISDICTION

Petitioner Michael R. McGuire invokes the jurisdiction of this Court under 28 U.S.C. § 1257(a).

The Court of Appeals entered a judgment and order affirming the judgment of the Thurston County Superior Court on June 6, 1990. App. A. Michael R. McGuire then sought review by the Supreme Court of Washington, which denied Michael R. McGuire's timely filed Petition for Review on October 3, 1990. Denial Order is reprinted in Appendix B.

CONSTITUTIONAL PROVISIONS INVOLVED

Fourteenth Amendment, Section 1, To the United States Constitution provides in relevant part:

No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

Petitioner Michael McGuire's wrongful employment termination claim against the State of Washington was dismissed at summary judgment. His affidavit in opposition to the State's summary judgment motion is attached as Appendix C and shows as follows:

For nine and a half years petitioner McGuire had a successful career as an investigator for the Washington State Gambling Commisssion. His employment record was unblemished, and he consistently received high ratings from his supervisors. For years, he and other Gambling Commission investigators made a habit of playing golf on their own time

with licensees of the Commission. This was done openly and with the specific approval of the Executive Director of the Commission. McGuire frequently golfed with licensees in the company of his supervisor. Following a complaint by a licensee, the Executive Director of the Commission, summarily terminated McGuire for the stated reason that it was inappropriate for McGuire to be playing golf with licensees. McGuire's supervisor was given a two-week suspension for the identical activities.

As a nine and one-half year employee, McGuire was fired just a few months before his state pension rights vested. Because of the sensitive nature of police and investigative work, he is no longer a candidate for employment as a law enforcement officer.

In his Complaint and Amended Complaint, McGuire asserted his rights under the Fourteenth Amendment of the Constitution, claiming a denial of due process prior to the loss of his property and liberty as secured by the Constitution.

The State of Washington Court of Appeals decision at issue held that McGuire was not entitled to a pre-termination hearing since his position was exempt from civil service regulations.

In denying that McGuire lost any "liberty" by being fired, the Washington State Court of Appeals stated that McGuire had "presented no evidence to show that his reputation was damaged or that he was thereby deprived of other employment opportunities," though his affidavit in opposition to summary judgment indicated he was "unemployable in the law enforcement field" and had "suffered deep financial problems" because of the wrongful termination. (Appendix C, Affidavit of McGuire, pages 8-9).

In reaching its decision, the Washington State Court of Appeals relied in part upon the Washington State Supreme

Court decision in *Jordan v. Oakville*, 106 Wn. 2d 122, 720 P.2d 824 (1986) which holds as follows:

> As we have held on numerous occasions, there is no constitutional "property" interest in public employment.

REASONS FOR GRANTING THE WRIT

After nine and a half years of more than satisfactory employment, the State of Washington Gambling Commission summarily fired petitioner McGuire for playing golf with a licensee of the Commisssion. This golfing activity had been specifically approved by the Executive Director of the Commission. The golfing was carried out openly, strictly on McGuire's own time and frequently in the company of McGuire's supervisor. McGuire not only lost the vesting of his state pension rights, he is no longer a viable candidate for employment in the law enforcement field.

The State Court of Appeals found that the Gambling Commission was without authority to make the written and verbal promises of continued employment absent "good cause" solely because the job category was exempt from civil service regulations. Because civil service regulations require a pre-termination hearing, the state court decision rationalized that an exempt employee can have no right to a hearing despite assurances to the contrary by the employing agency.

The decision below strips a significant segment of public employees from the due process requirements of the Fourteenth Amendment. When the Washington State Court of Appeals followed the guide of the Washington Supreme Court set down in *Jordan v. Oakville*, 106 Wn.2d 122, 120 P.2d 824 (1986) that "there is no constitutional 'property' interest in public employment," it was mislead by an improper concept of property rights to employment as set out by the U.S. Supreme Court.

In *Board of Regents v. Roth*, 408 U.S. 564, 33 L.Ed.2d 548, 92 S.Ct. 2701 (1972), this court dealt with the claim of a non-tenured faculty member whose employment contract was not renewed. That decision indicates the significance of the constitutional protections of property rights, at page 577, as follows:

> Only last year, the Court held that this principle "proscribing summary dismissal from public employment without hearing or inquiry required by due process" also applied to a teacher recently hired without tenure or a promise of continued employment. *Connell v. Higginbotham*, 403 U.S. 207, 208, 29 L.Ed.2d 418, 420, 421, 91 S.Ct. 1772.
>
> To have a property interest in a benefit, a person clearly must have more than an abstract need or desire for it. He must, instead, have a legitimate claim of entitlement to it. It is a purpose of the ancient institution of property to protect those claims upon which people rely in their daily lives, reliance that must not be arbitrarily undermined. It is a purpose of the constitutional right to a hearing to provide an opportunity for a person to vindicate those claims.

CONCLUSION

It is apparent that the Washington State Court of Appeals decision under review does not adequately assess the impact of the Fourteenth Amendment on the rights of state government employees that do not happen to be covered by civil service.

Respectfully submitted this 28th day of December, 1990.

James M. Beecher
Counsel of Record
Gary A. Boe
HACKETT, BEECHER & HART
2200 Westlake Center
1601 Fifth Avenue
Seattle, Washington 98101-1625
(206) 624-2200

Counsel for Petitioner

APPENDIX A

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

WILLIAM R. McGUIRE, Appellant, v. THE STATE OF WASHINGTON, and RONALD O. BAILEY and JANE DOE BAILEY, his wife, and the marital community composed thereof, Respondents.	No. 12641-9-II DIVISION TWO FILED: June 6, 1990

PETRICH, J. — Michael McGuire appeals from a summary judgment dismissing his claim of wrongful discharge against the State of Washington and Ronald Bailey, Director of the State Gambling Commission. McGuire was discharged from his position as a Gambling Commission investigator, a position which is exempt from the state civil service law.[1] McGuire's discharge followed an internal investigation concerning his history of playing golf with licensees, including a licensee under investigation by the Gambling Commission.

The issues presented are whether the employment status of an exempt state employee is terminable at will and whether that status may be modified by the principles of *Thompson v. St. Regis Paper Co., infra.* We must also resolve whether

[1] RCW 9.46.080 provides in relevant part that "personnel occupying positions requiring the performing of undercover investigative work shall be exempt from the provision of chapter 41.06 RCW . . ." RCW 41.06 is the state civil service law.

McGuire's liberty interest, protected by the procedural due process clause of the Fourteenth Amendment, was implicated by the manner of termination. We affirm.

Summary judgment is appropriate if the "pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." CR 56(c). This court must engage in the same inquiry as the trial court. *Wilson v. Steinbach*, 98 Wn. 2d 434, 437, 656 P.2d 1030 (1982). All reasonable inferences from the facts are to be considered in a light most favorable to the nonmoving party. *Wilson*, 98 Wn. 2d at 437. The moving party bears the burden of proving that there is no genuine issue of fact which could influence the outcome at trial. *Hartley v. State*, 103 Wn. 2d 768, 774, 698 F.2d 77 (1985).

In general, an employment contract that is indefinite in duration is terminable at will by either the employer or the employee. *Roberts v. ARCO*, 88 Wn. 2d 887, 894, 568 P.2d 764 (1977). Such a contract is terminable by the employer only for cause if (1) there is an implied agreement to that effect, or (2) the employee gives consideration in addition to the contemplated service. *Roberts*, 88 Wn. 2d at 894. In addition, *Thompson v. St. Regis Paper Co.*, 102 Wn. 2d 219, 233, 685 P.2d 1081 (1984), held that promises of specific treatment in specific situations found in employee manuals or handbooks issued by an employer to his or her employees may, in appropriate situations, obligate the employer to act in accord with those promises.

The exemption of McGuire's position from the state civil service law and the lack of any contractual terms to the contrary (none have been provided), make the employment relationship between McGuire and the Gambling Commission terminable at will. However, McGuire contends that the Gambling Commission created an implied contract with him

by virtue of employment manuals and handbooks and evaluation, disciplinary, and grievance procedures that he would be fired only for cause.

In making his argument, McGuire combines and confuses the theory of implied contract with the theory of specific treatment in specific situations. Under *Thompson*, these are distinct exceptions to the terminable at will relationship and should be discussed separately. 102 Wn. 2d at 233.

The *Thompson* court specifically held that under its facts, there was no implied contract. 102 Wn. 2d at 224. Similarly here, we see no evidence of an implied contract between McGuire and the Gambling Commission. What McGuire apparently contends is that he comes under the holding of *Thompson* concerning promises of specific treatment in specific situations. However, we agree with the respondents' position that the Gambling Commission lacked authority to modify its employment relationship with McGuire.

The power and authority of an administrative agency is limited to that which is expressly granted by statute or necessarily implied therein. *McGovern v. Department of Social & Health Servs.*, 94 Wn. 2d 448, 450, 617 P.2d 434 (1980); *Barendregt v. Walla Walla School Dist. 140*, 26 Wn. App. 246, 249, 611 P.2d 1385, *review denied*, 94 Wn. 2d 1005 (1980). As noted above, RCW 9.46.080 expressly exempts investigatory positions from the state civil service law. The civil service scheme requires the state to show cause before it disciplines, suspends, or dismisses covered employees. Further, it defines what conduct constitutes cause.[2] Any attempt by the Gambling Commission to confer upon an employee the very rights

[2] RCW 41.06.150 mandates the state personnel board to adopt and promulgate rules, regulations, and procedures for the dismissal, suspension, or demotion of an employee and appeals therefrom. Pursuant to the authority granted in part by RCW 41.06.150, WAC 356-34-010 lists nine causes for which a permanent employee may be demoted, suspended, reduced in salary or dismissed. WAC

(footnote continued on next page)

from which the employee is statutorily exempt would be ultra viries and void as a matter of law. Therefore, if the Gambling Commission made promises of specific treatment in specific situations to McGuire, those promises would be void.

McGuire argues that he was deprived of his liberty interest in future employment without due process of law. A liberty interest is infringed if the government either (1) imposes a stigma and thereby forecloses the employee's freedom to obtain other employment or (2) dismisses an employee on grounds that call into question his or her integrity, honor, or good name in the community. *Board of Regents v. Roth*, 408 U.S. 564, 33 L.Ed.2d 548, 92 S. Ct. 2701 (1972); *Dicomes v. State*, 113 Wn. 2d 612, 629-30, 782 P.2d 1002 (1989); *Ritter v. Board of Comm'rs*, 96 Wn. 2d 503, 510, 637 P.2d 940 (1981).

McGuire argues that his liberty interest was infringed by Bailey's statement to members of the Seattle office that he was discharged for reasons other than playing golf. He contends that whether he suffered a deprivation of his liberty interest from this statement and from his termination itself is a question of fact and inappropriate for summary judgment. However, *Dicomes* and *Jordan v. City of Oakville*, 106 Wn. 2d 122, 720 P.2d 824 (1986), involved similar challenges and were resolved on summary judgment. In both cases, the Supreme Court held that the employee's liberty interests were not infringed.

This case is similar to *Jordan*, in which the plaintiff alleged that his employer made derogatory remarks about him to the city council. However, the plaintiff presented no evidence to

---

356-34-040 permits dismissal for cause and prescribes the procedure to be followed, including notice requirements. WAC 356-34-080 permits a permanent employee who has been subject to disciplinary action to appeal to the personnel appeals board. It also permits appeal by any employee adversely affected by a violation of the state civil service law, RCW 41.06, or of the merit system rule, WAC 356.

show that his reputation was damaged or that he was thereby deprived of other employment opportunities. *Jordan*, 106 Wn. 2d at 131. Similarly here, McGuire makes only assertions that his reputation was damaged and that law enforcement agencies are suspicious of applicants who have been terminated by other agencies. The record is devoid of any evidence that he was deprived of other employment opportunities as a result of a reputation damaged by Bailey's comment.

"Nearly any reason assigned for dismissal is likely to have some negative reflection on an individual. However, not every dismissal assumes a constitutional magnitude." *Jordan*, 106 Wn. 2d at 131, quoting *Giles v. Department of Social & Health Servs.*, 90 Wn. 2d 457, 461, 583 P.2d 1213 (1978). Here, McGuire's liberty interest was not implicated and, therefore, there was no denial of procedural due process.

Based on our disposition of this case, it is unnecessary to address the immunity defense posed by the respondents.

Affirmed.

s/Petrich, J.

WE CONCUR:

s/Alexander, C. J.
s/Worswick, J.

APPENDIX B

THE SUPREME COURT OF WASHINGTON

WILLIAM R. McGUIRE, Petitioner. v. THE STATE OF WASHINGTON, and RONALD O. BAILEY and JANE DOE BAILEY, his wife, and the marital community composed thereof, Respondents.	No. 57367-1 ORDER

This matter came before Department I of the Court on its October 23, 1990, Motion Calendar on Petition for Review. Department I having considered the Petition and the files herein:

Now, therefore, it is hereby

ORDERED:

That Petition for Review is denied.

DATED at Olympia, Washington this 3rd day of October, 1990.

s/Keith M. Callow
Chief Justice

APPENDIX C

IN THE SUPERIOR COURT
OF THE STATE OF WASHINGTON
IN AND FOR THE COUNTY OF THURSTON

WILLIAM R. McGUIRE, Plaintiff, vs. THE STATE OF WASHINGTON, and RONALD O. BAILEY and JANE DOE BAILEY, his wife, and the marital community composed thereof, Defendants.	No. 88-2-01425-3 AFFIDAVIT OF MICHAEL R. McGUIRE IN OPPOSITION TO DEFENDANTS' SUMMARY JUDGMENT MOTION AND IN SUPPORT OF MICHAEL McGUIRE'S CROSS-MOTION FOR PARTIAL SUMMARY JUDGMENT

STATE OF WASHINGTON]
COUNTY OF KING] SS.

MICHAEL R. McGUIRE, being first duly sworn, on oath deposes and says:

1. I am the Plaintiff in the above-entitled action. I make this affidavit on the basis of my personal knowledge and in opposition to Defendants' Motion for Summary Judgment and in support of my Cross-Motion for Summary Judgment.

2. At the time of my termination, I was employed by the State of Washington as a Special Agent IV for the Washington State Gambling Commission, an agency of the State of Washington.

3. I was hired by the Washington State Gambling Commission on January 22, 1979. Through my 9½ continuous

years of employment as an investigator and as a Special Agent, my performance was evaluated yearly by my supervisor and by the Assistant Director of the Washington State Gambling Commission. Each of my yearly evaluations show that I performed at or above the requirements for the position held. See Exhibit 1 attached hereto.

4. My duties as an investigator mandate that I have contact with licensees of the Washington State Gambling Commission. These contacts allow me to have access to sources of information which are necessary to the performance of my duties. One of the activities which allowed me to communicate in an open setting with licensees was the playing of golf.

5. In 1983, my immediate field supervisor, Mr. Robert DeForeest, and I asked our regional manager, Mr. Ken McDannald, whether it was appropriate for Mr. DeForeest and myself to participate in a golf tournament organized and sponsored by a Gambling Commission licensee. Licensees are those proprietors certified to engage in the manufacture, sale and distribution of legal gambling devices in the State of Washington. Mr. DeForeest, myself, and other investigators had been invited to participate in this tournament.

6. Mr. Ken McDannald has testified in deposition that he was concerned about our participation in such a tournament and phoned Mr. Ronald Bailey, Assistant Director (at that time) for the Washington State Gambling Commission to determine whether playing in the tournament was appropriate. Mr. DeForeest and I were present in the room when Mr. McDannald made this phone call.

7. Mr. McDannald has testified that Mr. Bailey did not feel that participation by Gambling Commission investigators in such a golf tournament sponsored by licensees was proper. Mr. McDannald then asked Mr. Bailey whether investigators could golf on an individual basis with licensees.

8. Mr. Bailey stated that it would be proper for investigators, such as Mr. DeForeest and myself, to play golf on an individual basis with licensees. Mr. Ken McDannald and Mr. Robert DeForeest have testified that Mr. Bailey authorized the playing of golf in this telephone conversation.

9. At no time subsequent to this authorization by Mr. Bailey did any Gambling Commission member, employee, or anyone associated with the Gambling Commission indicate, in any way, that I or any other investigator should not golf on an individual basis with a licensee. Gambling Commission members, administrators, and other investigators all knew that my supervisor, Mr. DeForeest, and I were playing golf with licensees and non-licensees on a fairly regular basis. No one ever voiced any concern over our activities.

10. Gambling Commission rules have always been based on voluntary compliance by licensees. Voluntary compliance requires personal compliance with Commission rules by a licensee without constant surveillance or investigation.

11. Golfing with licensees was not solely for recreation. I received valuable information and leads concerning the activities of licensees while golfing with licensees. Similarly, Mr. Robert DeForeest has testifed in deposition that he felt that his golfing activities with licensees was beneficial to the Gambling Commission in that he also received "leads" and other information while on the golf course with licensees.

12. The last time I ever golfed with a licensee was in October of 1987. This was because of personal time restraints and was not because of any directive or statement by anyone involved with the Washington State Gambling Commission. Therefore, over eight months had passed before allegations of "golfing with licensees" became an issue.

13. Ronald Bailey's affidavit in Support of Defendants' Motion for Summary Judgment states that, "In April of 1988

I received a complaint from a licensed distributor of gambling products, Mr. Fred Gasperetti, concerning an employee of his who is a licensed distributor representative, Mr. Marco Couronous." Mr. Couronous is one of the licensees with whom I had occasion to golf on an individual basis.

14. At no time has Mr. Bailey ever explained why Mr. Gasperetti considered it appropriate for Mr. Bailey, and the Gambling Commission, to intercede in an in-house employee/employer conflict.

15. Mr. Bailey's affidavit alleges that Mr. Gasperetti did not believe that I would be "impartial investigating or supervising investigation of a complaint against Mr. Couronous . . ."

16. Mr. Gasperetti's allegations of lack of impartiality were never communicated to me prior to my termination.

17. My performance record as a 9½ year veteran as a Gambling Commission investigator is unblemished. Similarly, my record as a police officer for the five years prior to my becoming a Gambling Commission investigator is clean.

18. At no time was any investigation against any licensee, especially Mr. Couronous, ever compromised because of my golfing relationship with licensees. To the contrary, my investigative performance was enhanced by my contacts with these licensees.

19. The record is clear that I personally assisted in an investigation and recommended severe disciplinary actions against Mr. Couronous. I was brought into the investigation because my relationship with Mr. Couronous allowed me close access to his thought-processes and activities.

20. No allegations have been, or can be, made that my performance or any of my investigations were negatively impacted by my golfing with a licensee.

21. On January 22, 1988 my yearly performance evaluation was completed by Mr. Robert DeForeest, and in the normal course of administration, was concurred with by the Assistant Executive Director of the Gambling Commission. Attached as Exhibit 17 is this "Employee Performance Evaluation" of January 22, 1988. As is apparent, my overall rating for each category was meeting or exceeding normal requirements. No indication is made on this evaluation that there was any concern about my golfing activities with licensees or that I was golfing during normal working hours without making up the time in the evenings or on weekends.

22. My time records indicate that I never worked less than the 160 hour monthly quota when employed by the Washington State Gambling Commission.

23. The Defendants allege that I was "gambling" during these golfing activities with licensees. Any wagering which occurred was of the legal variety allowed in the State of Washington. This was the "friendly wagering" which most, if not all, golfers participate in as an adjunct to the enjoyment of a golfing round. The most ever bet on a round was under $5. Further, Mr. Bailey has testified he does the same gambling activity when golfing.

24. Defendants scurrilously allege that a licensee "paid for my green fees." This is simply not true. On one or two occasions I had forgotten to bring enough money to the golf course to pay for my green fees. A licensee offered to loan the green fee monies which I paid back within 24 hours. This is not accepting a gratuity. Mr. Bailey, prior to the instigation of this lawsuit, never indicated that taking such a minimal loan for such a minimal time was against any rule or policy of the Washington State Gambling Commission. Other law enforcement officers have made the same loans to me and I have done the same for them.

25. I golfed with a licensee under investigation because to stop doing so would give the licensee warning that something might be possibly wrong. This would be detrimental to any investigation and would not facilitate the overall objective of the Washington State Gambling Commission.

26. I was not notified of my termination prior to any meeting with Mr. Ronald Bailey or anyone in the administration of the Washington State Gambling Commission.

27. Two investigators, Mr. Richard Nicks and Mr. Neil Nunamaker, interviewed me briefly prior to my formal termination. Subsequent conversations have alerted me that the decision to terminate me had already been made by Mr. Bailey prior to these interviews.

28. Robert DeForeest has testified that these investigations never stated any charges against him or me other than "golfing with licensees." Again, "golfing with licensees" was previosuly approved by Mr. Ronald Bailey, who then fired me for the same activity.

29. It was days after my termination that I was finally given formal notice of the allegations supposedly serving as the basis of my termination.

30. Prior to my instituting this lawsuit, Mr. Ronald Bailey never indicated that he had lost confidence in my abilities as a Washington State Gambling Commission supervisor or investigator.

31. When conversing with other members and investigators of the Washington State Gambling Commission, I often use the word "bullshit." This is especially true when someone has deprived my family and myself of my livelihood without warning and for activities which were authorized by the terminating agent, Mr. Ronald Bailey. This common descriptive term was used only post-termination.

32. Prior to Mr. DeForeest and my terminations, Mr. DeForeest spoke with Mr. Bailey about the "unbelievable" potential disciplinary action that Mr. Bailey was about to take against Mr. DeForeest and myself. Mr. DeForeest has testified in deposition that he threatened "legal action" against Mr. Bailey if he was terminated. Mr. Bailey then reduced Mr. DeForeest's disciplinary sanction to a two-week suspension rather than a termination.

33. At the time of my termination, I did not make a similar threat to bring legal action against Mr. Bailey. Threatening the use of legal processes seems to be the only difference between my reaction to the termination and Mr. DeForeest's reaction to the termination.

34. Various witnesses have testified that the whole Seattle office was "shocked and surprised" by my termination for the alleged activities. No one in that office felt that my golfing activities had compromised the office's reputation or abilities to investigate. All of the Seattle investigators demanded to know what else I did which would justify this severe disciplinary action. The investigators were told by Mr. Bailey that I did "other things that he wouldn't talk about."

35. Licensees and others outside the Commission have heard these vague allegations of Mr. Bailey.

36. I have read all the personnel manuals, directives, memos, personnel evaluation materials, and the Washington Administrative Code Section 356 on "Disciplinary Actions."

37. I relied on these documents and expected my employer to rely and comport with the provisions of these documents.

38. I always considered myself as an employee of the State of Washington. My payroll check was issued by the State of Washington. My pension benefit plan was administered by the State of Washington. The Washington State Gambling

Commission is an agency and is fiscally accountable to the State of Washington. The Washington State Gambling Commission created an atmosphere of job security and fair treatment and promised specific treatment in specific situations, such as a chance for a hearing prior to being fired. Around the Seattle office of the Washington State Gambling Commission were various manuals which outlined the responsibilities and duties of each investigator and also defined each of our rights as to discipline and possible termination proceedings.

39. As a Gambling Commission supervisor, I had the responsibility of implementing the evaluation and disciplinary rules and procedures promulgated by the State and the Gambling Commission. I consulted the Washington Administrative Code, Department of Personnel manuals and evaluation materials when evaluating or disciplining those under my supervision.

40. My understanding, and the general understanding of the employees in the Seattle Gambling Commission office, was that we could only be terminated for "just cause." Former Gambling Commission Director Keith Kaiser informed all Seattle office employees in 1981 that we would remain employeed */sic/* unless we broke Gambling Commission rules.

41. Both Mr. DeForeest and Mr. McDannell, long-time Gambling Commission investigators, also relied on these assurances and published policies.

42. Gambling Commission member Thomas Keefe, an attorney, has expressed outrage in a letter to other Commission members at the lack of proper hearings prior to my being terminated.

43. Because of the sensitive nature of police and investigative work, this wrongful termination has made me unemployable in the law enforcement field. My family and I have

suffered deep financial problems, humiliation, embarrassment, and severe emotional distress because of this termination.

44. I was fired only months before my pension rights were to vest.

45. Despite all these important parts of my life being at stake, e.g., my job and my pension, I was not given a pre-termination hearing to hear the allegations against me and to respond.

s/Michael R. McGuire

SUBSCRIBED AND SWORN to before me this 26th day of January, 1989.

s/Katherine A. Gore
NOTARY PUBLIC in and for the State of Washington, residing at Seattle.
My commission expires: 10-10-90.

Supreme Court, U.S.
FILED
FEB 4 1991
OFFICE OF THE CLERK

(2)

NO. 90-1107

IN THE
SUPREME COURT
OF THE
UNITED STATES

OCTOBER TERM, 1990

MICHAEL R. MCGUIRE,

Petitioner,

v.

THE STATE OF WASHINGTON; RONALD O. BAILEY AND JANE DOE BAILEY, HIS WIFE, AND THE MARITAL COMMUNITY COMPOSED THEREOF,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE WASHINGTON STATE COURT OF APPEALS DIVISION II

RESPONDENTS' BRIEF IN OPPOSITION

KENNETH O. EIKENBERRY
Attorney General
State of Washington

MICHAEL P. LYNCH*
ELIZABETH J. ERWIN
Assistant Attorneys General
**Counsel of Record*

4407 Woodview DR SE
Olympia, Washington 98504-8084
(206) 459-6600

Attorneys for Respondents

QUESTIONS PRESENTED

1. Whether, as a matter of state law, Mr. McGuire had a property interest in continued employment.

2. Whether the decision not to explain the basis for Mr. McGuire's termination infringed upon a constitutional interest in future employment.

TABLE OF CONTENTS

Page

Questions Presented i

Table of Authorities iv

Statement Of The Case 1

Reasons Why The Petition Should Be Denied 3

A. Pursuant to Washington State Law The Petitioner Does Not Have A Property Interest In Continued Employment 3

B. The Decision Not To Explain The Reasons For McGuire's Termination From Employment Did Not Implicate A Liberty Interest 7

Conclusion 8

TABLE OF AUTHORITIES

Cases

Page

Board of Regents v. Roth, 408 U.S. 564, 92 S. Ct. 2701, 33 L. Ed. 2d 548 (1972) 3, 7

Correa-Martinez v. Arrillaga-Belendez, 903 F. 2d 49, 54-55 (1st Cir. 1990) 6, 7

Duke v. Langdon, 701 F. 2d 768 (D.C. Cir. 1983) 8

Hadley v. County of Du Page, 715 F. 2d 1238 (1983) 7

Jordan v. Oakville, 106 Wn.2d 122, 720 P.2d 824 (1986) 4, 7

Lipp v. Board of Education of City of Chicago, 470 F. 2d 802, 805 (7th Cir. 1972) 7

McGuire v. State, 58 Wn. App. 195, ____ P.2d ___ (1990) 5

Mervin v. F.T.C., 591 F. 2d 821 (9th Cir. 1978) 7, 8

Paul v. Davis, 424 U.S. 693, 701, 96 S. Ct. 1155, 1160, 47 L. Ed. 2d 405 (1976) 3

Roberts v. ARCO, 88 Wn.2d 887, 568 P.2d 764 (1977) 4

Salisbury v. Stone, 518 A. 2d 1355, 1357 (R.I. 1986) 5, 6, 7

State Employees v. State, 101 Wn.2d 536, 682 P.2d 869 (1984) 4

Ventetulo v. Burke, 470 F. Supp. 887, 892, (D. R. I. 1978) aff'd 596 F.2d 476 (4th Cir. 1979) 6

Statutes and Regulations

RCW 9.46.080 4
RCW 41.06 4
WAC 356 4

NO. 90-1107

IN THE
SUPREME COURT
OF THE
UNITED STATES

OCTOBER TERM, 1990

MICHAEL R. MCGUIRE,

Petitioner,

v.

THE STATE OF WASHINGTON; RONALD O. BAILEY AND JANE DOE BAILEY, HIS WIFE, AND THE MARITAL COMMUNITY COMPOSED THEREOF,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE WASHINGTON STATE COURT OF APPEALS DIVISION II

RESPONDENTS' BRIEF IN OPPOSITION

STATEMENT OF THE CASE

The Washington State Gambling Commission is a law enforcement agency that enforces the statutes and regulations concerning gambling activities. The petitioner, Michael McGuire, was an employee of the Commission and worked as a Special Agent IV conducting and supervising undercover investigative work in the Seattle area until his termination in May, 1988.

In April, 1988, Commission Director Ronald O. Bailey, respondent, received a complaint from a licensed gambling distributor of gambling products, Mr. Fred Gasperetti, con-

cerning an employee of his, Mr. Marco Courounes. Because of Mr. McGuire's close social association with Marco Courounes, Mr. Gasperetti requested that the Seattle office of the Commission not conduct the investigation of Mr. Courounes. It was Mr. Bailey's understanding that Mr. Gasperetti did not believe that petitioner McGuire would be impartial in investigating or supervising the investigation of his complaint against Mr. Courounes.

Due to the nature of Mr. Gasparetti's concern regarding the Seattle Office, Mr. Bailey initiated an investigation into the alleged social relationship between Mr. McGuire and Mr. Courounes. Mr. Bailey was concerned that such social association would be perceived by other licensees or other law enforcement agencies and the public as potentially affecting Mr. McGuire's required impartiality.

While being interviewed by the Assistant Director conducting the investigation, Mr. McGuire admitted that he had allowed licensees, such as Mr. Courounes, to pay for his greens fees, and had wagered with licensees, both occurring when he had not taken any money with him to the golf course. He played golf with Mr. Courounes over twenty times.

During the time frame when Mr. McGuire was golfing and socializing with Mr. Courounes, Mr. Courounes was being investigated for, charged with, convicted of, and on probation for criminal and administrative violations of the Washington State Gambling Act. Mr. McGuire's office had been in charge of the investigation against Mr. Courounes.

Mr. Bailey found nothing praiseworthy about Mr. McGuire openly consorting with a licensee who was being investigated for and then convicted of criminal violations of state gambling laws. As director of the Gambling Commission, Mr. Bailey found that the appearance of unfairness, favoritism, and lack of impartiality posed a substantial danger to the credibility of not only Mr. McGuire, but the Gambling Commission which he was representing.

On May 10, 1988, Mr. McGuire was informed that he would be terminated. He then immediately requested that he be allowed to come to Mr. Bailey's office to discuss this matter with him. Mr. Bailey agreed. At this meeting, Mr. Bailey told Mr. McGuire that his socializing with Mr. Courounes, despite his criminal gambling and administrative background, coupled with Mr. McGuire's admissions to accepting greens fees and wagering with licensees, compounded by the investigation's conclusion that he played golf during working hours, would result in McGuire no longer being employed by the Commission. Mr. McGuire, at this point in the meeting, told Mr. Bailey that this decision was "bull-shit" and where he came from, the acceptance of a $1,000-$2,000 gratuity wasn't even "hay feed."

Because Mr. McGuire's undercover investigative position was statutorily exempted from the state civil service system, he received a notice of termination which contained no specific information concerning the reasons for his termination. Appendix A contains a copy of the termination letter to Mr. McGuire. Only in response to this lawsuit did Mr. Bailey make public, through his Affidavits, the basis for his decision to terminate McGuire. *See* First and Second Affidavit of Ronald O. Bailey, Appendix B.

REASONS WHY THE PETITION SHOULD BE DENIED

A. Pursuant To Washington State Law The Petitioner Does Not Have A Property Interest In Continued Employment.

As a prerequisite to stating a cognizable due process claim, a plaintiff must demonstrate the existence of a constitutional property interest. *See Paul v. Davis*, 424 U.S. 693, 701, 96 S. Ct. 1155, 1160, 47 L. Ed. 2d 405 (1976). In order to have a property interest this court in *Board of Regents v. Roth*, 408 U.S. 564, 577, 92 S. Ct. 2701, 33 L. Ed. 2d 548 (1972) established the following test.

To have a property interest in a benefit, a person clear-

> ly must have more than an abstract need or desire for it. He must have more than a unilateral expectation of it. He must, instead have a legitimate claim of entitlement to it. * * * Property interests, of course, are not created by the constitution. Rather, they are created and their dimensions are defined by existing rules of understandings that stem from an independent source such as state law or understandings that secure certain benefits and that support claims of entitlement to those benefits.

Therefore, in order to have a due process expectation, Mr. McGuire must first have a property interest. The question of whether Mr. McGuire has a property interest is governed by state law. *Id.* Generally, under Washington law, a public employee has no vested property right in public employment and possesses no due process rights apart from the protections afforded by statute. *Jordan v. Oakville*, 106 Wn.2d 122, 720 P.2d 824 (1986); *Roberts v. ARCO*, 88 Wn.2d 887, 568 P.2d 764 (1977).

In *State Employees v. State*, 101 Wn.2d 536, 682 P.2d 869 (1984), the Washington State Supreme Court held:

> [T]he terms and conditions of public employment * * * are basically controlled by statute, not by contract * * * [as i]t is clearly within the province of the legislature to enact statutes regulating the 'mode and appointment and tenure in public employment.'"

101 Wn.2d at 541.

By statute, in Washington the majority of state employees are specifically protected by a comprehensive civil service merit system which provides that they can only be terminated for cause. *See* Chapter 41.06 RCW and Chapter 356 WAC (Washington Administrative Code). Mr. McGuire, as an undercover investigator for the Washington State Gambling Commission was specifically, statutorily, exempted from the civil service system. RCW 9.46.080 provides in relevant part that ". . . personnel occupying positions requiring the performing of undercover investigative work shall be exempt from the provisions of chapter 41.06 . . ." *See* Appendix C.

Accordingly, as a matter of state law Mr. McGuire has been statutorily exempted from the requirement that his termination be based upon cause. He is, therefore, without a cognizable property interest in continued employment. This was the holding of the Washington State Court of Appeals in *McGuire v. State*, 58 Wn. App. 195, ___ P.2d ___ (1990).

There is nothing novel or unexpected in this state court ruling. Indeed, it is widely recognized that state legislatures have the authority to exempt certain positions from civil service system protection. In *Salisbury v. Stone*, 518 A. 2d 1355, 1357 (R.I. 1986), the Rhode Island Supreme Court noted that because of Mr. Salisbury's status as an unclassified state employee, he served at the pleasure of the appointing authority and, as a matter of law, was without a cognizable property interest in continued employment. The court specifically noted:

> Salisbury's at will status is not predicated upon his employment for an indefinite term. Rather, it is predicated upon his employment as an unclassified state employee. Cases providing a rationale to alter the common law at will rule do not provide a valid rationale to alter the at will employment status established by the legislature for unclassified state employees.

Salisbury v. Stone, *supra*, at 1360.

Because the Washington State Legislature specifically exempted Mr. McGuire's position from any requirement that his termination be based upon cause, any attempt to confer such a benefit upon Mr. McGuire would be beyond the authority of the Washington State Gambling Commission. Such an attempt would be *ulta vires* and void as a matter of state law. *McGuire v. State*, *supra*, at 198-199.

It is a well recognized rule of law that a government employer cannot confer upon an employee a benefit of which the legislature has specifically, statutorily deprived the employee. Here again, in rejecting an implied contract theory advanced by Mr. Salisbury, the Rhode Island Supreme Court stated:

> Salisbury ignores the legal significance of his undisputable status as an unclassified state employee. As we later point out, the alleged preemployment promises, even if presumed to have been made, cannot as a matter of law, expand the limits imposed by the Legislature upon the termination rights of unclassified state employees.

Salisbury v. Stone, *supra*, at 1358. *See Ventetulo v. Burke*, 470 F. Supp. 887, 892, (D. R. I. 1978) *aff'd* 596 F.2d 476 (4th Cir. 1979).

On this same subject, in *Correa-Martinez v. Arrillaga-Belendez*, 903 F. 2d 49, 54-55 (1st Cir. 1990) the court, in interpreting the civil service system of the Puerto Rican judicial system noted the distinction between civil service positions which were terminable only for cause and the non-civil service "trust" position which the plaintiff had occupied. The court upheld the district court's dismissal pursuant to FRCP 12(b)(6) of the plaintiff's claim that an implied contract had been created through his engagement letter from the Director of Personnel. On this point the court stated:

> So, plaintiff's construct has force only if, and to the extent, that the personnel director could effectively limit OCA's statutory powers by adopting terms and conditions outside of, and flatly inconsistent with, the legislatively mandated criteria. This is a Houdini-in-reverse argument, which assumes that a government employer could be securely locked into a box that the legislature has purposely left wide open. We find altogether untenable the notion that civil service laws can be so nimbly sidestepped.
>
> * * *
>
> Indeed, for plaintiff's general argument to prevail, the carefully thought out civil service system could easily be wrecked by mid-echelon managers bent on shaping the system to their own ends.

Id. at 54-55.

Quite simply, the decision below correctly held that Mr. McGuire, under an implied contract theory, could not boot strap himself into a status of being terminable only for

cause, when the legislature had specifically exempted him from such status. *Accord Correa-Martinez v. Arrillaga-Belendez, supra*; *Salisbury v. Stone, supra*.

B. The Decision Not to Explain the Reasons for McGuire's Termination from Employment Did Not Implicate a Liberty Interest.

Mr. McGuire also alleges that his liberty interest in continued employment was violated when Mr. Bailey refused to inform other Seattle investigators of the basis for Mr. McGuire's termination. [1]

Roth states that the "concept of liberty recognizes two particular interests of a public employee: 1) the protection of his good name, . . . and 2) his freedom to take advantage of other employment opportunities." *Roth*, 408 U.S. at 573-74, 92 S.Ct. 2707.

The decision to terminate an employee by itself has some negative reflection on an individual, however that action alone does not assume a constitutional magnitude. *Hadley v. County of Du Page*, 715 F. 2d 1238 (1983); *Lipp v. Board of Education of City of Chicago*, 470 F. 2d 802, 805 (7th Cir. 1972); *Board of Regents v. Roth*, 408 U.S. at 573-74, 92 S. Ct. at 2707; *Mervin v. F.T.C.*, 591 F. 2d 821 (9th Cir. 1978); *Jordan v. Oakville*, 106 Wn.2d 122, 131, 720 P.2d 824 (1986).

In Mr. McGuire's case, the trial court determined that the only evidence that Mr. McGuire's reputation was damaged was his own conclusions and beliefs. The only testimony concerning his inability to obtain employment in the law enforcement field was his own self serving opinion that law enforcement agencies are suspicious of applicants who have been terminated.

---

[1]The only statement upon which Mr. McGuire bases his liberty interest claim—"There is more, a lot more, to it than playing golf and I'm not telling you anything else"—was also the basis for Mr. McGuire's defamation claim. The trial court found this statement was true, and that finding was not appealed. Therefore, Mr. McGuire's claim that he has been deprived of a constitutional liberty interest is based upon a true statement made by Mr. Bailey.

The trial court determined that this alone did not constitute proof of a violation of a liberty interest. Hence summary judgment was granted. *See also Duke v. Langdon*, 701 F. 2d 768 (D.C. Cir. 1983), (liberty interest violation not sustained where plaintiff could not allege any stigma or injury to her reputation beyond that inherent in any termination); *accord Mervin v. F.T.C., supra*, 591 F.2d at 828, (court dismissed the liberty claim when termination notice communicated only that plaintiff did not adequately perform his duties at FTC).

Merely being fired without explanation does not violate the Constitution of the United States.

CONCLUSION

Mr. McGuire was exempted from the requirement that his termination be based upon cause. As a matter of state law the Court of Appeals found that he was, therefore, terminable at will and did not have a property interest in continued employment. Because he does not have a property in continued employment he does not have a due process expectation and the state court was correct in dismissing his case. Regarding his claimed liberty interest deprivation, the actions of Mr. Bailey in not setting forth the reasons for Mr. McGuire's termination did not impugn Mr. McGuire's liberty interest in his future employment.

For the reasons given above, the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

KENNETH O. EIKENBERRY
Attorney General

MICHAEL P. LYNCH
Counsel of Record
ELIZABETH J. ERWIN
Assistant Attorneys General

APPENDIX A

May 26, 1988

Mr. Michael McGuire
14654 - 126th Avenue, N.E.
Kirkland, Washington 98033

Dear Mr. McGuire:

You are hereby notified that your employment with this agency is terminated effective at 5 p.m. on May 25, 1988.

Since you are employed in a non-civil service position which is exempt from Merit System Rules, you do not have the right to appeal this action to the Personnel Appeals Board.

I am attaching a memo from our fiscal office and a letter from the State Employees Insurance Board outlining the conditions under which you may continue to self-pay SEIB medical and dental coverages under new federal law, (COBRA).

If you have any questions concerning processing, pay, or any other matter relating to this action, please contact Carol Weber, Personnel Manager, at 753- 6161.

Sincerely
/s/ RONALD O. BAILEY
Director

ROB/CBW:rac
Enclosures
Certified
cc: Personnel

APPENDIX B

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON IN AND FOR THE COUNTY OF THURSTON

NO. 88-2-01425-3

MICHAEL R. McGUIRE,

Plaintiff,

vs.

THE STATE OF WASHINGTON
RONALD O. BAILEY and JANE DOE
BAILEY, his wife, and the
marital community composed thereof,

Defendants.

AFFIDAVIT OF RONALD O. BAILEY IN SUPPORT OF SUMMARY JUDGMENT

STATE OF WASHINGTON }
} ss
COUNTY OF THURSTON }

RONALD O. BAILEY being first duly sworn upon oath deposes and says:

1. I am currently the Director of the Washington State Gambling Commission. I was appointed to this exempt position by the Commissioners of the Washington State Gambling Commission in November of 1986.

2. I have been continuously employed by the Gambling Commission since 1974.

3. As one of my responsibilities as Director, I hire and take disciplinary action, including suspension and termination, concerning all employees of the Gambling Commission.

4. My office received a complaint in April of 1988 from a licensed distributor of gambling products, Mr. Fred Gasperetti, concerning an employee of his who is a licensed distributor representative, Mr. Marco Courounes. Mr.

Courounes geographic sales area is Seattle. Mr. Gasperetti alleged that Mr. Courounes was violating several WAC provisions which the Commission is charged to enforce. After making this formal complaint, Mr. Gasperetti requested that the Seattle Office of the Washington State Gambling Commission not conduct in the investigation of Mr. Courounes. Mr. Gasperetti requested this because it was his belief that Mr. Michael McGuire, a supervisor of the regional area for Mr. Courounes, had a close, social association with Mr. Courounes. The Regional Manager for Seattle, Mr. Robert DeForrest, was also cited as having a close, social association with various licensees. It was Mr. Gasperetti's concern, as he related it to me, that the Seattle office may not conduct a fair and impartial investigation concerning the allegations against Mr. Courounes.

5. Because the nature of Mr. Gasperetti's concern regarding the Seattle office, I initiated an investigation not only as to Mr. Courounes' potential violations of the rules and regulations of the Gambling Commission, but also of the alleged close association concerning Mr. McGuire and Mr. DeForrest. I believed that such concerns by Mr. Gasperetti raise very serious questions of the Gambling Commission's investigative integrity and potential personal and professional compromising of the enforcement ability of the Washington State Gambling Commission. I believed that because the Gambling Commission is a law enforcement agency that cooperates with other law enforcement agencies in receiving criminal information and intelligence, any allegation of this type concerning an employee could not go unchecked.

6. A formal investigation concerning the conduct of Mr. McGuire and Mr. DeForrest was done by the Special Investigations Unit of the Washington State Gambling Commission. Two investigators were assigned who took statements, obtained records, and interviewed various people connected to the allegations. A report was submitted to me which I read to determine the seriousness and validity of the allegations that Mr. McGuire and Mr. DeForrest

were potentially associating with licensees such that it was perceived by a member of the licensed public that they, as supervisors of the investigation, could not be unbiased.

7. On May 4, 1988, I reviewed the investigator's reports concerning Mr. McGuire. I instructed Assistant Director in charge of Special Agents, Richard Nicks, to go to Seattle and speak with Mr. McGuire concerning the allegations in the report. Mr. Nicks was instructed to determine Mr. McGuire's position with regards to each allegation contained in the report.

8. On May 5, 1988, Mr. Nicks informed me that he had spoken with Mr. McGuire concerning the allegations. On May 5, 1988, I asked Mr. Nicks and Deputy Director, Frank Miller, to review all the report and to consider the information that was supplied by Mr. McGuire personally to Mr. Nicks on May 5, 1988. Both Nicks and Miller were to make a recommendation with regards to the sufficiency of the allegations in the report and any appropriate discipline action, if any at all was warranted.

9. My review of the report submitted by the Special Investigation's Unit indicated that Mr. McGuire had began playing golf in 1986 through 1987 with Marco Courounes, a licensed distributor representative, as well as several other licensees. Mr. Courounes was currently under investigation by the Gambling Commission concerning violations of WAC 230, et. sec., as well as having been assessed a $13,000 civil penalty and placed on probation by the Washington State Gambling Commission concerning his violations of WAC rules in 1986. He was also criminally charged for the very same conduct for which the Gambling Commission placed him on probation. Mr. Courounes' criminal and administrative background was known to Mr. McGuire at the time he was playing golf with him as he was the Special Investigator who was responsible ultimately for the case which placed Mr. Courounes on probation, assessed a civil and criminal penalties.

10. The investigative report I reviewed indicated that Mr. McGuire did not demonstrate taking any time off from

work hours when he would engage in the social activity of golfing with Mr. Courounes. Mr. McGuire's time sheets demonstrated that he was not entitled to any compensatory time to utilize in lieu of annual leave for these social golf games. Nor did the reports reflect annual leave utilized for golf games. Mr. McGuire golfed mostly on Thursday afternoons.

11. Based on my review of the investigative report and the recommendations of Mr. Nicks and Mr. Miller to terminate Mr. McGuire, it was my belief that Mr. McGuire, by his repeated socializing with Mr. Courounes, who was on administrative probation and had a recent criminal conviction for gambling- related conduct, had compromised his integrity and ability to take enforcement action against Mr. Courounes and all the other licensees he had golfed with. I also believed that he had been compromised regarding all future enforcement actions with licensees. It was my opinion that as Mr. McGuire was the supervisor of a large portion of the geographical areas in Seattle, he had failed to keep an arm's length from those members of the public with whom he is to take or supervise the taking of possibility criminal and civil and/or administrative action. I lost confidence in Mr. McGuire's abilities and judgments concerning his social conduct with those people in the gambling industry for whom he acts as a police officer. Given his lack of judgment in how his socializing could and was viewed by the public, other licensees, and other law enforcement agencies, I felt that he could no longer be trusted with intelligence information supplied by the Organized Crime Unit of the Washington State Patrol as well as other law enforcement agencies in his geographic regions.

12. Mr. McGuire informed me on May 10, 1988, at which time he was formally notified of his termination by Mr. Nicks, that he had in fact also accepted greens fees from licensees upon occasion. Mr. McGuire told me that he would occasionally go to golf courses without money on hand. He would then receive greens fees which he would later pay back to which ever licensee loaned him the money.

It was my belief that Mr. McGuire may or may not have paid back all the greens fees he received. I did not believe that he had paid them all back. I believe that going to a golf course without money to pay for greens fees when the participants in the game were licensees is unacceptable. I believe this conduct demonstrates an unacceptable willingness by a law enforcement officer to accept a gratuity.

13. I also considered the information that Mr. McGuire did not take time off from his employment to either set up golf games or to participate in the games. It is my belief that he maintained a social association with licensees while being paid by the Washington State Gambling Commission.

14. In the May 10, 1988, meeting with Mr. McGuire I informed him that given Mr. Courounes criminal and administrative background, coupled with Mr. McGuire's admission to accepting greens fees, and playing golf during work hours, he would no longer be employed with the Washington State Gambling Commission. At that point in time Mr. McGuire expressed to me that my decision to terminate him was "bullshit" and that I had overreacted. He told me that there was nothing wrong with his conduct. He informed me that where he was from, the acceptance of one to two thousand dollars in gratuity was insignificant. Where he comes from such a gratuity is "not even hay feed".

15. After my discussion with Mr. McGuire on May 10, 1988, my decision to terminate Mr. McGuire remained firm. He display of insubordination to me and his failure to comprehend the seriousness of his misconduct reaffirmed my lack of confidence in his abilities. His attitude demonstrated a lack of concern for the Washington State Gambling Commission and how his conduct had and would impact the agency.

16. Based on my understanding of RCW 9.46.080, Mr. McGuire, because he was a Special Agent performing undercover investigative work, was an exempt employee. I informed Mr. McGuire that should he wish to resign rather

than be terminated by Gambling Commission, he could do so. Mr. McGuire elected not to resign and his employment was formally terminated on May 25, 1988.

17. I have not discussed Mr. McGuire's acceptance of greens fees from licensees while playing golf, his compensation by the Gambling Commission while playing golf, wagering with licensees, and Mr. McGuire's attitudes and displays of insubordination with any person outside of the Washington State Gambling Commission management employees, the Commissioners in executive session, and with legal counsel until my deposition as requested by Mr. McGuire.

I declare under penalty of perjury that the above is true and correct.

DATED this 13th day of January, 1989.

/S/ RONALD O. BAILEY

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON IN AND FOR THE COUNTY OF THURSTON

NO. 88-2-01425-3

MICHAEL R. McGUIRE,

Plaintiff,

vs.

THE STATE OF WASHINGTON RONALD O. BAILEY and JANE DOE BAILEY, his wife, and the marital community composed thereof,

Defendants.

SECOND AFFIDAVIT OF RONALD O. BAILEY IN SUPPORT OF SUMMARY JUDGMENT

STATE OF WASHINGTON } ss
COUNTY OF THURSTON }

RONALD O. BAILEY, being first duly sworn upon oath deposes and says:

1. I am the Director of the Washington State Gambling Commission. I have been so employed since November, 1986. In that capacity I have personal knowledge of the matters stated herein.

2. I first became aware that Mr. McGuire was alleged to have a social association with Mr. Courounes in April, 1988. It was at this time that I ordered an investigation concerning the allegations made by Fred Gasperetti in my first affidavit filed.

3. I have read the Affidavit of Michael R. McGuire filed herein.

4. The "personnel manuals, directives, memos, personnel evaluation materials, and WAC 356-34" referred to by Mr. McGuire were not intended, since my appointment as Director of the Washington State Gambling Commission, to provide Mr. McGuire with any contractual terms of employment. As Director, it was my understanding that

since all investigators such as Mr. McGuire were exempt from Chapter 41.06 RCW, the length of his employment was subject to my discretion.

5. As Director, I have not made any employment assurances to Gambling Commission employees who were exempted from Chapter 41.06 RCW. I had no authority from the Commission or the State of Washington to do so, as RCW 9.46.080, in my understanding of it, prohibited me from doing so.

6. I have not authorized or implemented any policy to act as terms of employment, to create an atmosphere of job security, or promise specific treatment of an individual employee in any specific situation.

7. Mr. McGuire did not file a grievance of his termination with the Washington State Gambling Commission.

8. In accord with the Command Policy on Discipline, prior to making my final decision concerning Mr. McGuire, I consulted with Assistant Director Nicks and Deputy Director Miller. I instructed them to each read the investigative report concerning Mr. McGuire and to formulate a disciplinary recommendation, if any at all. Both recommended to me that I terminate Mr. McGuire. I sought their respective opinions in order to be fair and just in determining whether Mr. McGuire should receive discipline.

9. The exempt job class description for Mr. McGuire's last held position with the Washington State Gambling Commission required the following job functions:

> Assists the Regional Manager is formation of regional policies and procedures or with special projects or presentations; may act for the Regional Manager in his/her absence and/or manage a field or district office. Assists in the selection, hiring, performance evaluation and proposed disciplinary actions of all assigned subordinate staff. Trains and supervises * * *lower level special agents. * * *
>
> Pursuant to RCW 9.46.080, this position shall be exempt from the provisions of Chapter 41.06 RCW. * * *
>
> . . Initiates, directs and supervises inspection of licensee's on-premise financial records, rules, and regula-

tions, gambling equipment, facilities, and methods of operation. Plans, directs, and supervises detailed financial investigations of licensed gambling activities to include in-depth review of all financial records to determine and ensure compliance with established financial controls; provides screening of licensed activities to determine compliance for financial reporting and to support division investigations.* * *

10. I was informed by Assistant Director Nicks that Mr. McGuire told him that he received loans of greens fees from at least Mr. Courounes. Mr. McGuire also admitted to me that he received loans for greens fees from Mr. Courounes.

I swear under penalty of perjury that the above is true and correct to the best of my knowledge.

DATED the 1st day of February, 1989.

/S/ RONALD O. BAILEY

SUBSCRIBED AND SWORN to before me this 1st day of February, 1989.

/S/ MAXINE WHITE

NOTARY PUBLIC in and for the State of Washington, residing at Olympia
Commission Expires: 9-10-91

APPENDIX C

RCW 9.46.080 provides:

* * * [P]ersonnel occupying positions requiring the performing of undercover investigative work shall be exempt from the provisions of chapter 41.06 RCW, as now law or hereafter amended.